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Nos. 93-356, 93-521

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.
Respondents.

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF THE CALIFORNIA BANKERS CLEARING HOUSE ASSOCIATION, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE SECURITIES INDUSTRY ASSOCIATION, VISA, U.S.A., INC. AND THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This case raises the issue of whether the Federal Communications Commission ("Commission") has authority to

modify the tariff-filing requirements of the Communications Act of 1934 by relieving carriers that lack market power of the filing obligation with respect to some of their services. The Commission has adopted such a policy on the grounds that it would, among other things, "de-facilitate" price collusion among the major carriers in the highly concentrated market for interexchange telecommunications services. This brief is filed, with the written consent of the parties, on behalf of the associations listed below.

Amici are associations of large users of the telecommunications services of the major interexchange carriers (AT&T, MCI and U.S. Sprint). The California Bankers Clearing House Association and the New York Clearing House Association are associations of the leading (and largest) banks in California and New York, respectively. They serve as clearinghouses through which their members settle accounts and present checks and other payment instruments; they also represent their members on issues of common concern. The Securities Industry Association is an association of over 600 securities firms in the United States and Canada. VISA, U.S.A., Inc. is an association of some 20,000 financial institutions that use the VISA service mark in connection with payment systems (including debit and credit cards), check authorizations, automated teller machines and related services. The Ad Hoc Telecommunications Committee is an unincorporated trade association whose members include some of the nation's largest business users of telecommunications services and products; the organization represents its members' interests in telecommunications matters before the Commission and in the federal courts.

Amici and/or their members have entered into multi-year, multi-million-dollar service agreements with carriers that, pursuant to the Commission's challenged policy, do not file

tariffs for all of their services. Others have similar arrangements with AT&T, which is the only interexchange carrier currently excluded from the Commission's "detariffing" policy. Still others have arrangements with more than one carrier. All have a keen interest in the competitiveness of the interstate interexchange market, and submit this brief in order to offer a perspective on the Commission's policy — its value in deterring collusive pricing by the three major vendors in a highly concentrated market — that neither Petitioners nor Respondents are certain to present.

STATEMENT OF THE CASE

The last seven years have witnessed a substantial increase in competition in the market for interstate interexchange services.[1] Large users — including corporations, governments and non-profit institutions — have benefited from this phenomenon through lower rates and a greater willingness on the part of interexchange carriers to tailor their offerings to meet unique customer needs. A key reason for this increased competitiveness and responsiveness has been the Commission's policy permitting certain carriers to conduct business on an off-tariff basis.

Prior to 1985, even the largest users purchased virtually all of their interstate telecommunications services at the prices listed in tariffs filed by carriers with the Commission. After

[1] "Interexchange" services are those that involve the carriage of calls between different local telephone exchanges. Such services are commonly called "long distance" services. The Commission's detariffing policy applies to all non-dominant carriers, *i.e.*, those that lack market power. Membership in that category has expanded as competitors have emerged to challenge monopoly providers in markets for services other than interexchange, such as the local exchange market. While this brief focuses on the interexchange market, its analysis is equally applicable to the detariffing policy generally.

the Commission began issuing orders in its *Competitive Carrier* proceeding in the early 1980's,[2] large users began to purchase interexchange services on an off-tariff basis from the newly emergent interexchange carriers, notably MCI and Sprint. Six years ago this trend took a new turn as AT&T reacted to the inroads being made by its principal competitors and began to offer large users the opportunity to negotiate customized service arrangements, initially under its F.C.C. Tariff No. 12, and later through several other tariffs.[3]

Despite the Commission's adoption of a detariffing policy, MCI and Sprint have always offered most of their services pursuant to tariff.[4] They have opted, however, to take advantage of the Commission's detariffing policy when structuring custom network service agreements. Today, large customers commonly solicit bids from one or more carriers (whether informally or by means of a detailed "request for proposal"),

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[2]*See Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor ("Competitive Carrier"), First Report and Order,* 85 F.C.C.2d 1 (1980) (concluding that tariff-filing requirements should be lightened for carriers lacking market power); *Second Report and Order,* 91 F.C.C.2d 59 (1982), *recon. denied* 93 F.C.C.2d 54 (1983) (making tariff-filing optional for resellers who do not own facilities); *Fourth Report and Order,* 95 F.C.C.2d 554 (1983) (extending permissive detariffing to non-dominant facilities-based carriers). The Commission order at issue in this case is a reaffirmation of those policies, based upon a comprehensive analysis by the Commission of its authority in light of the evolution of the industry in the intervening years.

[3]These arrangements generally include services to meet all or most of the customer's needs, *e.g.*, switched services for voice communications (outbound and inbound ("800"), domestic and international), private lines to link corporate business locations and data centers and the local access services that connect the customer to the carrier's interexchange network. They typically include network management, and may also include calling card, videoconferencing and other services.

[4]Indeed, MCI successfully opposed a Commission attempt to *forbid* non-dominant carriers from filing tariffs at all. *MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985).

work with the bidders to improve their offers, and award the business based upon an analysis of the "best and final" offer of each. This can be a hotly contested process, yielding competitive prices and hitherto unavailable features that meet the unique needs of individual customers.[5] By the end of 1993, AT&T alone had nearly 1000 negotiated service arrangements in place, and MCI and Sprint between them had 500-1000 more. Most high-volume users now purchase interexchange service in this manner.

As AT&T's competitors have matured, they have won the confidence of an increasing number of large customers, making negotiated service arrangements the most competitive segment of the interstate interexchange marketplace.[6] This is also the arena in which AT&T's tariffed services compete directly with the detariffed services of its major competitors.

SUMMARY OF ARGUMENT

The Communications Act requires every common carrier to file tariffs for its services, but grants the Commission discretion to modify that requirement "for good cause shown." Over

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[5]Such features include, for example, rate structures adapted to the customer's needs. A customer that uses a large number of very short calls to validate credit cards for retail merchants would prefer one-second (rather than 18- or 6-second) pricing units for 800 service. A customer for whom the uninterrupted flow of data is a critical business need may want a carrier to participate in developing, testing and executing disaster recovery plans and may further want the right to specific and effective remedies for lengthy or repeated service failures at key business locations. Some features that were first negotiated by customers in this highly competitive segment of the market have found their way into the carriers' general tariffs where other customers may take advantage of them. *See, e.g.*, AT&T Communications Tariff F.C.C. No. 2, § 2.6.5 (guaranteeing alternative routing for 800 service outages).

[6]*Competition in the Interstate Interexchange Marketplace, Report and Order*, 6 F.C.C. Rcd 5880, 5887 (1991), *recon.*, 6 F.C.C. Rcd 7569 (1991), *further recon.*, 7 F.C.C. Rcd 2677 (1992), *Notice of Proposed Rulemaking*, 5 F.C.C. Rcd 2627, 2634-35 (1990).

a decade ago, the Commission did precisely that, adopting a policy of permissive detariffing for some of the services of non-dominant carriers. The record before the agency demonstrated that such a policy would encourage the rapid development and deployment of new services, and put downward pressure on rates by enhancing competition in the market for interstate telecommunications services. In particular, the Commission found that off-tariff pricing would discourage implicit price collusion among the three carriers whose collective share of the market for interexchange telecommunications services approaches 90%.

The Commission adopted a policy of permissive detariffing for non-dominant carriers over a decade ago and recently reaffirmed the lawfulness and the wisdom of that determination. Because the policy is consistent with the Act, *amici* urge the Court to reverse the June 4, 1993 judgment of the U.S. Court of Appeals for the District of Columbia Circuit summarily reversing the Commission's order in *Tariff Filing Requirements for Interstate Common Carriers, Report and Order,* 7 F.C.C. Rcd 8072 (1992), *stayed,* 7 F.C.C. Rcd 7989 (1992) (*"1992 Report and Order"*). *American Tel. & Tel. v. FCC,* No. 92-1628 (D.C. Cir. June 4, 1993).

ARGUMENT

The Communications Act, adopted 60 years ago, generally contemplates a scheme in which carriers publish tariffs for their common carrier offerings and may charge neither more nor less for those services than the rates set forth in those tariffs. 47 U.S.C. § 203(a), (c). It also authorizes the Commission to "modify any requirement made by . . . this section . . . ." 47 U.S.C. § 203(b)(2). Subsection 203(b)(2) further states that the Commission may exercise this discretion only "for good cause shown," and permits the Commission to do

so "either in particular instances or by general order applicable to special circumstances or conditions . . . ." The only statutory limit on the exercise of the Commission's discretion is that the agency may not extend the notice period for tariff filings beyond 120 days.

The Commission has interpreted its authority under Section 203(b)(2) to permit the adoption of a detariffing policy applicable to common carriers lacking market power. A "well-settled principle of federal law" requires judicial "deference to reasonable interpretations by an agency of a statute that it administers." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, ___ U.S. ___, 112 S. Ct. 1394, 1401 (1992). Under that principle, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). Indeed, where Congress has not itself addressed "the precise question at issue," the courts must affirm any reasonable agency interpretation. *Id.* at 842-43. Here, the Commission has repeatedly and with great care determined that it has the discretion to adapt the statutory tariff-filing requirement to a market whose evolving structure and conditions would have astonished the 73rd Congress which authored the Communications Act. It has also found that permissive detariffing would in fact further the fundamental purposes for which the statute was enacted. Analysis of the text of Section 203 and the context in which it must be applied compel the conclusion that the Commission was correct on both counts.

I. The Text Of Section 203 Supports The Commission's Authority To Permit Detariffing By Some Carriers Of Some Of Their Services.

The Commission's action in adopting the *1992 Report and Order* is consistent with its authority as set forth in Section 203(b)(2). The agency modified one of the requirements made "by . . . this section,"[7] *i.e.*, the requirement that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges for itself . . . for interstate and foreign wire or radio communication . . . ." 47 U.S.C. § 203(a). It did not abolish the tariff-filing requirement for *all* carriers or for *all* services, but determined that this requirement should apply only to *some* carriers (those lacking market power) and only for *some* services (domestic interstate services). *1992 Report and Order*, 7 F.C.C. Rcd at 8081 (App. B) (non-dominant carriers); *International Competitive Carrier Policies, Report and Order*, 102 F.C.C.2d 812, 843 (1985) (establishing tariff-filing rules for the international services of non-dominant carriers). It has taken this action "by general order applicable to special cir-

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[7]Congress could not have intended the reference to "this section" to refer only to Subsection 203(b)(2). We must "presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, ___ U.S. ___, 112 S. Ct. 1146, 1149 (1992). In light of the references elsewhere in the Communications Act to a particular "subsection," *see* 47 U.S.C. §§ 152(b); 155(c)(1), (2), (4), (7); 156(c); 158(a); 204(b); 221(a), Congress's failure to use similar language in Section 203(b)(2) is significant. Moreover, it would be nonsensical to assume that Congress intended to limit the modification power to only those requirements set forth in Subsection 203(b)(2) in light of the fact that Subsection 203(b)(2) contains no requirements at all. Because the substantive requirements of Section 203 lie entirely in Subsections (a) and (c), Congress could only have intended the modification power conferred by Subsection (b)(2) to pertain to those provisions.

cumtances or conditions'' and, as discussed more fully below, has done so ''for good cause shown.''[8]

At the heart of the issue before this Court is the meaning of the phrase ''modify any requirement made by'' as it is used in Section 203(b)(2). Section 203(a) sets forth the tariff-filing requirements in bare-bones terms: every carrier shall file and make public a schedule of its rates and the classifications, practices and regulations affecting them, including the effective date of each rate. The Commission's authority to ''modify'' any of those requirements must — if it means anything — mean that the Commission may permit a carrier to *not* file or *not* make public the listed information. Any narrower reading of the authority to ''modify'' would render Section 203(b)(2) a nullity because it would confer no authority on the Commission.

The decision that formed the basis for the Court of Appeals' June 4 order invalidating the Commission's detariffing policy was premised on just such a narrow reading. In *American Tel. & Tel. Co., v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S. Ct. 3020 (1993), the court held that the word ''modify'' grants the Commission authority to make only ''circumscribed alterations'' in the require-

[8]Section 203(c) offers further support for the Commission's authority to act as it has done. It states that no carrier, ''unless otherwise provided by or under authority of this chapter,'' shall offer service unless it has filed a tariff consistent with the statute and applicable regulations. On its face, this language contemplates the possibility that some carriers may be relieved of the obligation of filing tariffs in at least some circumstances. If Congress intended this to refer only to those cases where it had itself authorized off-tariff arrangements, *see, e.g.*, U.S.C. § 211 (authorizing carriers to do business with one another by contract), the phrase ''or under authority of'' in Section 203(c) would be mere surplusage, a construction that should be avoided where possible. The only conceivable purpose of the phrase is to acknowledge the discretion granted the Commission in Section 203(b)(2) to permit detariffing of some carriers, who then would not be barred from offering service without first having filed and published tariffs.

ments of Section 203, and does not authorize the agency to permit any carrier to operate without a tariff. However valid the court's exegesis of the word "modify" may be when viewed in isolation, it leads to a construction of Section 203(b)(2) that, for the reasons stated above, would effectively revoke the authority that Congress granted.[9]

Opponents of permissive detariffing assert that this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S. Ct. 2759 (1990) ("*Maislin*") forecloses the Commission's reliance on its Section 203(b)(2) discretion to support the detariffing policy. *See* AT&T's Brief in Opposition at 9-12 (filed in Nos. 93-356, 93-521). But, even if *Maislin* is read as limiting the authority of the Interstate Commerce Commission ("ICC") to permit some carriers to operate without filing tariffs, the Federal Communications Commission is not similarly limited, because its organic act differs from this Interstate Commerce Act in a crucial respect.

Maislin follows a prior ruling by the Court of Appeals for the District of Columbia Circuit concerning the requirements to which the ICC's discretion to "change" statutory requirements may be applied. In *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.), the court held that the ICC's authority to "change" statutory requirements — conferred by Section 10762(d)(1) of the Interstate Commerce Act — extends only to the requirements contained in Section 10762, and *not* to those set

[9]The Court of Appeals' analysis would hold with respect to the details of tariff-filing—the amount of information to be included in tariffs, their form and so on—which are arguably susceptible to "circumscribed alteration." But the statute provides that those details are to be spelled out "under authority of" Section 203(a), not "by" Section 203(a).

forth in Section 10761.[10] The filed rate doctrine that the agency had sought to "change" in the policy struck down in *Maislin* appears in the latter section and was not, therefore, within the agency's discretion to "change." The ICC policy at issue in *Maislin* purported to waive carrier compliance with both sections, and this Court agreed that the ICC had no power to avoid the application of Section 10761. 110 S. Ct. at 2768-69. In contrast, the Federal Communications Commission's authority to "modify" extends to "any requirement made by . . . this Section," which manifestly includes the requirement that the detariffing policy purports to modify.[11]

II. The Commission Reasonably Concluded That The Permissive Detariffing Policy Serves The Purposes Of The Communications Act.

The Commission's authority to modify the Communications Act's tariff-filing requirements is conditioned upon a finding of "good cause." 47 U.S.C. § 203(b)(2). That condition does not exist in a vacuum and should be construed to permit agency action that furthers the purposes of the statute. Congress identified those purposes with clarity, stating that the goal of the

[10]The Court of Appeals noted that Section 10761 has its own (rather narrow) waiver provision, which would have been superfluous if the discretion conferred by Section 10762(d)(1) were construed to apply to that Section. 793 F.2d at 379. Section 203(a) of the Communications Act has no analogous feature.

[11]Section 203 of the Communications Act is broader than either Section 10761 or Section 10762 of the Interstate Commerce Act and contains the analogs of both provisions. *Compare* 47 U.S.C. § 203 *with* 49 U.S.C. §§ 10761, 10762. The power of the Federal Communications Commission to modify any requirement of Section 203 is, therefore, greater than the authority of the ICC to change any requirement of Section 10762. Although some may seek to minimize the distinction between the discretion conferred on these two agencies, *see* AT&T's Brief in Opposition at 12, such arguments are at base a quarrel with *Regular Common Carrier Conference* and say nothing about the proper construction of the Communications Act.

regulatory scheme is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. *See generally United States v. Southwestern Cable Co., Inc.*, 392 U.S. 157, 167-8, 173 (1968) (Communications Act gives Commission "a comprehensive mandate" with "expansive powers"), *quoting National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943).

Cognizant of its mission, the Commission has determined that relieving non-dominant carriers of the obligation to file tariffs for their domestic interstate services will "further[ ] the statutory purposes of the Communications Act." *1992 Report and Order*, 7 F.C.C. Rcd at 8078.[12] It cited several reasons why detariffing enhances competition and, conversely, why abandonment of this policy would frustrate the Act's purposes: tariff-filing by non-dominant carriers would provide a disincentive for innovation, inhibit price competition and discourage new entrants. *Id.* at 8079 & n.111. Citing more than a decade's experience, the Commission reaffirmed that detariffing "'eliminates a potential vehicle for collusive conduct and facilitates price discounting' and, therefore, serves the public interest better than streamlined regulation." *Id.* at 8080 n.118. Without prejudice to the other interests served by detariffing, *amici* here focus their attention on this last consideration.

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[12]In contrast, the Commission has determined that tariff filing requirements serve purposes that outweigh their disadvantages with respect to carriers that *do* have market power, *i.e.*, where most consumers lack competitive alternatives. *1992 Report and Order* at 8073; *Competitive Carrier, First Report and Order*, 85 F.C.C.2d at 20-22. In addition, the Commission has determined that all carriers—dominant and non-dominant—must file tariffs for their international services. *International Competitive Carrier Policies, Report and Order*, 102 F.C.C.2d at 843.

A. The Commission Has Long Recognized That Published Tariffs Pose A Risk Of Collusive Pricing Activity.

In proceedings other than the rulemaking at issue here, the Commission has been repeatedly confronted with the fact that tariffs do not necessarily ensure just and reasonable rates.[13] On the contrary, they permit carriers to monitor one another's rates, mimicking each other's decreases and increases and fostering the widely recognized practice of AT&T's competitors of pricing just below AT&T's rates. The risk of such "umbrella pricing" was among the reasons the agency gave for adopting detariffing more than a decade ago. *Competitive Carrier, Fourth Report and Order*, 95 F.C.C. 2d at 580; *Notice of Inquiry and Proposed Rulemaking*, 77 F.C.C. 2d 308, 313-14, 358-59 (1979).

In 1990-91, the Commission undertook a comprehensive examination of the state of competition in various segments of the interstate interexchange marketplace. In *Competition in the Interstate Interexchange Marketplace, Report and Order, supra*, the agency took three steps to adapt its regulatory policies to the current realities of the marketplace. All of them sought to reduce the risk of anticompetitive activity. First, the Commission reduced the 30-to-45-day notice period for AT&T tariff filings, stating that advance notice of price changes "foster[s] a reactive market, rather than a proactive one, and reduce[s] incentives for AT&T's competitors to 'stay on their

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[13]The ICC has reached a similar conclusion. *See, e.g., Water Transport Ass'n v. ICC*, 722 F.2d 1025, 1032 (2d Cir. 1983) (finding that disclosure of contract terms "can undermine competition by stabilizing prices at an artificially high level"); *Western Fuels-Illinois, Inc. v. ICC*, 878 F.2d 1025 (7th Cir. 1989).

competitive toes.''' *Id.* at 5895.[14] Second, it adopted rules permitting all interexchange carriers, dominant and non-dominant, to negotiate discounted rates for most services, based upon the Commission's finding that this "contract carriage" would "minimize the risk that tacit collusion will occur." *Id.* at 5899.[15] Third, the Commission sought to minimize the information that must be filed by the dominant carrier with respect to its contract carriage arrangements in order to avoid the disclosure of information that might increase the risk of tacit collusion. *Id.* at 5902. The agency's concerns about collusion between AT&T and its competitors were tempered by the fact that AT&T's competitors were not tariffing their agreements to serve the high-end business services market, making it easier for them to "cheat" on any implicit understandings about price levels and differentials.[16]

In a still more recent proceeding, the Commission again concluded that traditional tariffing by non-dominant carriers inhibits price competition. In the aftermath of the 1992 decision of the U.S. Court of Appeals for the District of Columbia Circuit in ***American Tel. & Tel. Co. v. FCC, supra,*** the Commission reluctantly set out to develop mandatory tariff filing

[14]Where non-dominant carriers elect to file tariffs for domestic services, the applicable notice period is short. 47 C.F.R. § 61.23(c) (as amended by ***Tariff Filing Requirements for Nondominant Common Carriers, Memorandum Opinion and Order,*** 8 F.C.C. Rcd 6752 (1993)) (one day for most filings), § 61.58(c)(6) (14 days for contract tariffs).

[15]The Department of Justice had told the Commission that contract carriage would reduce the likelihood that AT&T's competitors would—as part of a scheme of tacit collusion—price their services just under AT&T's announced "umbrella" price rather than with reference to their own costs. Reply Comments of the United States Department of Justice, CC Docket 90-132, filed September 28, 1990, at pp. 41, 44-46. *See also* National Economic Research Associates, Inc. Study (submitted in CC Docket 90-132 as an ex parte filing made by AT&T on May 15, 1991) at 69 (citing "umbrella pricing" as a user concern).

[16]*See* ***Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking,*** 5 F.C.C. Rcd at 2639-40.

requirements for non-dominant carriers. Once again, the agency found that "traditional tariff regulation of nondominant carriers . . . is actually counterproductive since it can inhibit price competition, service innovation, entry into the market, and the ability of carriers to respond quickly to market trends." *Tariff Filing Requirements for Nondominant Carriers, Memorandum Opinion and Order*, 8 F.C.C.Rcd at 6752 (footnotes omitted). The agency streamlined its rules for such carriers in the cited order, which is now on appeal. *sub nom. Southwestern Bell Corp. v. FCC*, No. 93-1562 (D.C. Cir.).

B. The Commission's Concerns About Collusive Pricing For Tariffed Services Are Well-Founded.

The Commission findings discussed above reflect the remarkably parallel pricing behavior over the last several years of the three major interexchange carriers for tariffed services.[17] Figure "A" illustrates the cost per minute paid under

[17]The trend—which has affected private line as well as switched services—has not escaped the notice of the telecommunications trade press. *MCI, Sprint Match AT&T's Across-the-Board Rate Increase*, TELECOMMUNICATIONS REPORTS, Aug. 2, 1993 at 34; *Rate Hikes: MCI, Sprint Follow AT&T's Lead*, COMMUNICATIONSWEEK, Aug. 9, 1993 at 60; *MCI, Sprint Again Follow AT&T's Pricing Lead*, TELECOMMUNICATIONS REPORTS, Oct. 4, 1993 at 32; *MCI, Sprint Match AT&T's Consumer Rate Increase Again*, TELECOMMUNICATIONS REPORTS, Dec. 6, 1993 at 12 ("Spokesmen for MCI and Sprint both acknowledged that their proposed rate revisions 'closely parallel' AT&T's latest increases."). *See also* E. Andrews, *Long Distance Big 3 Emerge From Price Wars as Winners*, THE N.Y. TIMES, July 23, 1993 at D-1, col. 4 ("After years of brutal price wars, the once viciously competitive long distance telephone business is turning into a surprisingly cozy and profitable industry.") The July-August rate increases followed by days announcements of healthy second quarter profits, while the November-December increases came several weeks after similar third quarter reports. *See* J.J. Keller, *AT&T Reports 8.6% Profit Increase in 2nd Period; Management Shift Made*, THE WALL ST. J., July 23, 1993 at A-2, col 2; A. Ramirez, *AT&T and MCI Show Increases in Net Income*, THE N.Y. TIMES, Oct. 22, 1993 at D-5, col. 3.

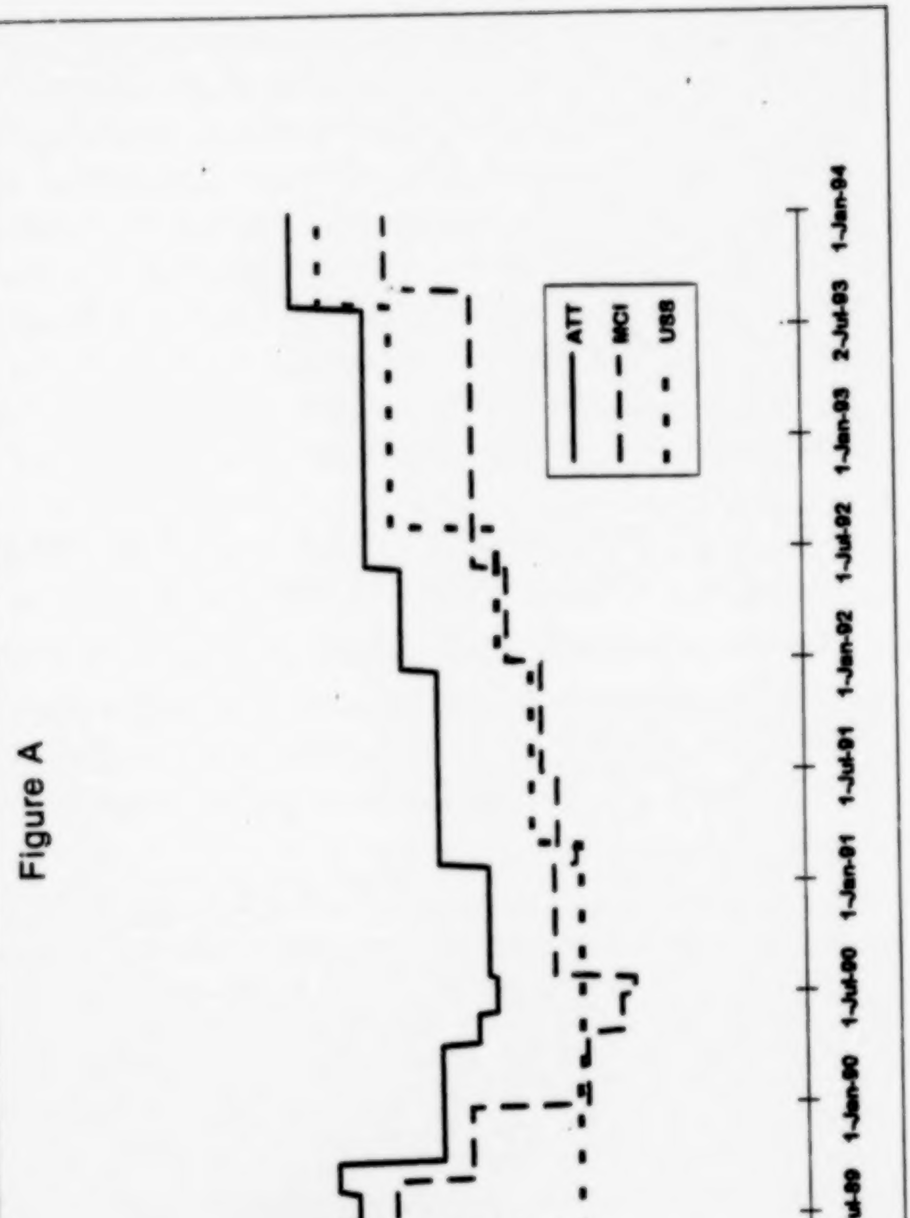
$0.18
$0.17
$0.16
$0.15
$0.14
$0.13
$0.12
1-Jan-89
1-Jul-89
1-Jan-90
1-Jul-90
1-Jan-91
1-Jul-91
1-Jan-92
1-Jul-92
1-Jan-93
2-Jul-93
1-Jan-94
ATT
MCI
USS

Figure A

published tariffs for switched voice services. The prices were calculated based upon the most favorable term plan for which a hypothetical, mid-sized business customer qualified.[18]

Mere parallelism does not prove that the carriers are engaged in an unlawful conspiracy, nor is it the aim of *amici* to make such a case. Nonetheless, both the Commission and the Department of Justice have identified factors in the telecommunications services industry that operate as what Professor Areeda calls "facilitating practices," which tend to increase the likelihood of anticompetitive activity.[19]

The costs of constructing a network of telecommunications transmission and switching facilities erect substantial entry barriers in this industry. *See Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking,* 5 F.C.C. at 2628. The Department of Justice has concluded that additional entry into the interstate interexchange market by facilities-based carriers is unlikely because of the considerable capital costs involved and because the large economies of scale may permit the survival of only a relatively few firms. Department of Justice, Reply, filed in CC Docket 90-132, at p. 30 ("DOJ Reply").[20]

[18]This data was compiled by Michael T. Hills, Ph.D., from the tariffs filed at the Commission by the named carriers for multi-location customers making 36-month service commitments and purchasing 1,000 hours of calling per month. The chart reflecting rates through 1992 was first published in *Network Services Update,* BUSINESS COMMUNICATIONS REVIEW, Feb. 1993, at 16-23. The chart reproduced in this brief will appear in the February 1994 issue of that publication.

[19]Professor Areeda defines "'facilitating' [as any] practice that eases tacit coordination among competitors and makes supra-competitive pricing somewhat more likely." 6 P. Areeda, Antitrust Law ¶ 1436e (1986).

[20]The Commission is not itself charged with enforcement of the antitrust laws as such. *See United States v. Radio Corp. of America,* 358 U.S. 334, 346 (1959). Nonetheless, antitrust considerations have long been held to be a legitimate concern for the agency. *See FCC v. National Citizens*

In addition, the three largest interexchange carriers account for some 90% of the market for those services.[21] The Department of Justice has concluded that AT&T, MCI and Sprint have sufficient market share among them to "suggest that the 'large business services' market is highly concentrated . . . under the type of HHI analysis used in the Department's Merger Guidelines . . . ." DOJ Reply at p. 28 n.46. Such high levels of concentration make the market particularly susceptible to collusion, express or tacit, as the Court recognized in *United States v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969) (competitors accounting for 90% of the market). The interexchange telecommunications services market is also characterized by other factors generally believed to facilitate collusion, including a diffuse market on the buyers' side, significant economies of scale and relatively standardized products. *See, e.g.*, H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW 100 (1985); R. Posner, *Oligopolistic Pricing Suits, the Sherman Act, and Economic Welfare*, 28 STAN. L. REV. 903, 906 nn. 10 and 11 (1976); R. Posner and F. Easterbrook, ANTITRUST 336-340 (2d ed. 1981).

In such an environment, the exchange of detailed pricing information among competitors has repeatedly been found to be an especially effective tool for the formation and preserva-

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Comm. for Broadcasting, 436 U.S. 775, 795-96 (1978) and cases cited therein. The Department of Justice *is* an antitrust enforcement agency, and its views on these issues should be accorded appropriate weight.

[21]The most recent analysis released by the Commission shows that the three major carriers took in 85-86% of all toll revenues reported to the Commission and to shareholders in the Third Quarter of 1993 and account for 93.6% of all presubscribed customer access lines in that same period. A substantial share of the 14-15% of the toll revenues not earned by AT&T, MCI and Sprint were earned by carriers that do not own their own facilities but resell services purchased from the major carriers. Federal Communications Commission, Industry Analysis Division, *Long Distance Market Shares, Third Quarter 1993*, Tables 4-6 (Dec. 1992).

tion of cartels, enabling them both to maintain supra-competitive prices and to detect and punish cheating by their members. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16, 426 (1978) (eight largest companies accounting for 94% of the market); *United States v. Container Corp. of America, supra; Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936); H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW, *supra* at 101 (exchange of price information one of the "most obvious" of collusion-facilitating practices); R. Posner, *Oligopolistic Pricing Suits, the Sherman Act and Economic Welfare, supra* at 906 n.10; *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 249-50 (1940); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921). Conversely, the ability of competitors to keep their prices secret from each other facilitates cheating and thereby hinders the development (or hastens the decline) of cartels. *See, e.g.*, R. Posner and F. Easterbrook, ANTITRUST, *supra*, at 199; I. Ayres, *How Cartels Punish: A Structural Theory of Self-Enforcing Collusion*, 87 COLUM. L. REV. 295, 296, 300 (1987).

It was eminently reasonable for the Commission to conclude that, under the universal, mandatory tariff regime that would have existed if the agency had not adopted its detariffing policy — and that would prevail if the judgment of the Court of Appeals were upheld — information exchanges of the kind that foster collusive pricing would be encouraged. In particular:

- accurate current information about a competitor's price would be available and there would never be a need for action more furtive than a visit to the agency's Tariff Reference Room (open to the public, Monday — Friday, 1:30 — 4:30 p.m.) or a subscription to one of several tariff publishing services;

- price changes would be announced prior to their effective date, as Section 203(a) requires; and
- carriers would be required to adhere to the announced price, as Section 203(c) requires.[22]

Such practices, if undertaken by competitors on a voluntary basis, have been the basis for a finding of unlawful price fixing. *See Sugar Inst., Inc., supra* (refiners accounting for 70-80% of the market published their prices and agreed not to grant secret price concessions); *United States v. Socony-Vacuum Oil Co., supra. See also,* 6 P. Areeda, Antitrust Law ¶¶ 1434b (exchange of information), 1435d (advance announcement of price and price changes and adherence thereto), 1435g (exchange of manuals setting forth pricing methodologies). It is not surprising, then, that the Department of Justice has urged the Commission to minimize public disclosure of carriers' rates, observing that, "by preserving the confidentiality of a carrier's rates from its rivals, the Commission would deprive the carriers of the type of knowledge and confidence that facilitates pricing collusion or coordination." DOJ Reply at p. 45 (citations omitted).

The cumulative effect of "facilitating" factors reduces the likelihood that any carrier would undercut existing prices, and

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[22]Commentators note that the dangers associated with posted prices are compounded if they are legally enforceable, since cartel members thereby have a risk-free means of punishing cheaters. *See* I. Ayres, *How Cartels Punish, supra* at 298; R. Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEORGETOWN L. REV. 1187 (1979). Section 203(c) constitutes just such an enforcement mechanism, requiring that, once a tariff is filed for a service, the carrier must charge all customers that tariffed rate. In contrast, where discounts from published prices are common, advance posting of non-discounted prices is less likely to facilitate price collusion. *See Reserve Supply Corp. v. Owens-Corning Fiber Glass Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) (discounts off list price cited as a common industry practice).

casts suspicion on the obviously parallel movement of the major carriers' prices.[23] In such an environment, the Commission's detariffing policy has much the same effect as an injunction or cease and desist order addressed to a "collective facilitating practice" in the context of an antitrust enforcement action.

The Commission adopted its detariffing policy when competition was in its infancy. By any measure, the 10-year experiment has succeeded. The policy is in no small part responsible for the "robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices." *1992 Report and Order,* 7 F.C.C. Rcd at 8079.[24] Although *amici* have concentrated in this brief on the deterrence of price collusion, we note that the detariffing policy has also served to foster service innovation, as the Commission anticipated. *1992 Report and Order,* 7 F.C.C. Rcd at 8079. For example, customers had long (and unsuccessfully) sought assistance from the interexchange carriers in detecting and preventing toll fraud, a problem that is estimated to account for $1-5 billion in losses annually.[25] Although they routinely monitored their own networks for abnormal calling patterns, neither AT&T, MCI nor Sprint would take responsibility for informing customers of suspected fraud or guaranteeing to block calls at the customer's request. Finally, one carrier broke ranks and offered a non-tariffed program that included monitor-

[23]*See* 6 P. Areeda, ANTITRUST LAW ¶ 1435b.

[24]Millions of business and residential customers today buy services from second- and third-tier non-dominant carriers operating without tariffs. Other than in the payphone area, no statutory or regulatory action has been necessary to protect consumers against unjust, unreasonable or unlawfully discriminatory rates. *See* Telephone Operator Consumer Services Improvement Act of 1990, *codified at* 47 U.S.C. § 226.

[25]*See, e.g., Policy and Rules Concerning Toll Fraud, Notice of Proposed Rulemaking,* FCC 93-496, CC Docket No. 93-292 (released Dec. 2, 1993) at ¶ 4.

ing, reporting and call-blocking guarantees. Other carriers, including AT&T, soon followed. While other factors may also have been at play with respect to toll fraud, and the maverick carrier later tariffed its program, there is no question but that the detariffing policy "de-facilitated" the carriers' parallel efforts to stifle service innovation.[26]

A decision by this Court to uphold the judgment of the Court of Appeals invalidating the detariffing policy would frustrate the goals of the Communications Act and slow the further evolution of competition. It would also hamper the Commission in its ability to respond to the shifting alliances of technology companies and the convergence of old and new technologies that now characterize the industry today. The impact that these developments will have on factors such as market entry and concentration is uncertain. But Congress has charged the Commission with determining how best to modify the requirements of Section 203(a) of the Communications Act, and the Act should not be construed in a manner that would tie the agency's hands.

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[26]The rapid pace of innovation in the non-tariffed features of custom network service agreements underscores the point. Carrier network management services, a common feature of such agreements, *see* note 3 *supra*, has evolved to a point where many customers turn over to the carriers key responsibilities that they had previously performed for themselves. The carriers' willingness to take on responsibilities for managing these complex networks and the diversity of terms offered by them has been encouraged by the fact that the terms governing network management are not tariffed. This contrasts sharply with the product standardization that is typical of cartels in which product information is exchanged. *See, e.g.*, H. Hovenkamp, ECONOMICS AND FEDERAL ANTITRUST LAW, *supra* at 100; R. Posner and F. Easterbrook, ANTITRUST, *supra* at 337.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and its order vacated.

Respectfully submitted,

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